No. 87-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS

EDWARD BENNETT WILLIAMS
KEVIN T. BAINE *
RICHARD S. HOFFMAN
KEVIN J. HASSON
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

MARK E. CHOPKO
General Counsel
PHILLIP H. HARRIS
Solicitor
United States Catholic Conference
1312 Mass. Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

Counsel for Petitioners

Of Counsel:
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether in the absence of a case or controversy under Article III, a district court nevertheless has judicial power to issue a subpoena and compel compliance through civil contempt.

2. Whether opponents of the Roman Catholic Church's position on abortion have standing under Article III of the Constitution to challenge the tax-exempt status of the Catholic Church.

PARTIES TO THE PROCEEDING

Lawrence Lader, Margaret O. Strahl, M.D., Helen W. Edey, M.D., Ruth P. Smith, National Women's Health Network, Inc., Long Island National Organization for Women-Nassau, Inc., Rabbi Israel Margolies, Reverend Bea Blair, Rabbi Balfour Brickner, Reverend Robert Hare, Reverend Marvin G. Lutz, Women's Center for Reproductive Health, Jennie Rose Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski, Judith A. Seibel, Karen DeCrow and Susan Sherer are also plaintiffs in the district court and respondents here. Secretary of the Treasury James A. Baker, III, and Commissioner of Internal Revenue Lawrence B. Gibbs are defendants in the district court and respondents here.*

* Pursuant to Rule 28.1, petitioner United States Catholic Conference states that it has no parent, affiliate or subsidiary corporations other than wholly-owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-416

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 824 F.2d 156. The May 8, 1986 opinion of the district court holding petitioners in civil contempt is reported at 110 F.R.D. 337. The May 9, 1986 order of the district court amending its contempt citation is unreported. Earlier opinions of the district court denying the motions to dismiss are reported at 603 F. Supp. 970 and 544 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals affirming the district court's contempt order was entered on June 4, 1987. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on July 30, 1987. The petition for a writ of certiorari was filed on September 11, 1987, and granted on December 7, 1987. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The plaintiffs in this case, Abortion Rights Mobilization, Inc. ("ARM") and others, seek a judicial order revoking the tax exemptions of approximately 30,000 Roman Catholic Church entities throughout the United States, on the purported ground that some or all of those entities have engaged in impermissible political activities. The affected Church entities, all of whom are covered by an annual group exemption letter, include not only the petitioners, the United States Catholic Conference and the National Conference of Catholic Bishops ("USCC/NCCB"), but also Catholic dioceses, parishes, elementary

and high schools, colleges, seminaries, hospitals, homes for the aged or infirm, orphanages, counseling centers, monasteries, retreat houses, refugee assistance groups and the like.[1]

In pursuit of discovery on the merits, the plaintiffs served subpoenas *duces tecum* upon USCC/NCCB, distinct organizations with identical memberships consisting of all active Roman Catholic bishops in the United States. USCC/NCCB moved to quash the subpoenas on the ground, among others, that the plaintiffs lacked Article III standing to bring the suit and the court therefore lacked Article III power to issue or enforce the subpoenas. The district court denied the motion to quash and subsequently held USCC/NCCB in civil contempt. A divided panel of the Court of Appeals for the Second Circuit affirmed without deciding whether the plaintiffs had standing. The panel majority held that USCC/NCCB themselves were without "standing" to challenge the court's Article III power.

A. The Complaint

The amended complaint was filed on behalf of nine organizations and 20 individuals against the Secretary of the Treasury, the Commissioner of Internal Revenue, and USCC/NCCB. Three of the group plaintiffs are tax-exempt organizations that advocate the continuation of legalized abortion. The other six are health clinics that perform abortions. The individual plaintiffs are clergymen and voters who oppose the Roman Catholic Church's religious teaching on abortion. None of the plaintiffs al-

---

[1] The group ruling, which is issued to the USCC, covers all entities listed in *The Official Catholic Directory*, which now includes 185 dioceses, 19,546 parishes, 7,485 elementary schools, 1,408 high schools, 238 colleges, 645 hospitals, and numerous other Catholic entities. Joint Appendix 24-27. *The Official Catholic Directory* entry for the Diocese of Brooklyn appears in the Joint Appendix in the Court of Appeals, at A 464.

leges any IRS enforcement actions, or threatened enforcement actions, against them personally or against their churches. They claim only that the granting of a tax exemption to "the Roman Catholic Church" in general violates section 501(c)(3) of the Internal Revenue Code,[2] denies the plaintiffs due process and equal protection, and constitutes an establishment of religion.

The complaint alleges, "[u]pon information and belief, . . . [that] Roman Catholic priests and other Church officials have actively and systematically participated in political campaigns in all parts of the country" to advance their belief that unborn life is human and must be protected. Joint Appendix ("JA") 11. The complaint alleges further, once again "[u]pon information and belief," that "[m]any Catholic priests and other Church officials . . . have, from their pulpits, regularly and repeatedly urged their congregants to donate to 'right-to-life' committees and political parties, to obtain (often in the church parking lot following the service) 'right-to-life' campaign literature, to sign the nominating petitions of 'right-to-life' candidates. At least one church has distributed 'right-to-life' leaflets with the church bulletin." JA 12-13. Plaintiffs allege that a policy statement adopted by the NCCB in 1975, the Pastoral Plan for Pro-life Activities, is the "blueprint for the Church's illegal activities." JA 10-11.

The complaint seeks an injunction ordering the government to (1) "revok[e] the tax exemption of the Roman Catholic Church," (2) assess and collect all resulting

[2] At the time the amended complaint was filed, section 501(c)(3) exempted from federal income taxation those entities "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." In 1987 Congress amended section 501(c)(3) to refer also to political campaign activities "in opposition to" any candidate for public office. Pub. L. 100-203 (1987).

back taxes, and (3) notify the Church's contributors that they may not claim charitable tax deductions for their contributions. JA 18-19.

B. The Motions To Dismiss

The government and USCC/NCCB moved to dismiss the complaint on several grounds, including lack of standing. On July 19, 1982, the district court granted the motions in part and denied them in part. Appendix to the Petition for a Writ of Certiorari. ("Pet. A.") 54a-92a. The court dismissed the claims against USCC/NCCB, but held that the plaintiffs (except five clinics) had standing to sue the government. The court found that the clergy plaintiffs had standing under the Establishment Clause, because they had "devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology." Pet. A. 67a-68a. The court found that all of the other individual plaintiffs and the three advocacy organizations had standing as voters. Pet. A. 69a-74a. The district court denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). JA 2.

C. The Subpoenas

After USCC/NCCB had been dismissed as parties, ARM served subpoenas *duces tecum* on USCC/NCCB, demanding the production of voluminous internal Church documents relating to the Church's religious position on abortion and its communications with the IRS. The subpoenas demanded, among other things, the following documents: (1) all drafts of the Pastoral Plan for Pro-life Activities, a 1975 statement of the U.S. bishops' theological, moral and social position on abortion, JA 70, ¶ 1; (2) the minutes of the bishops' discussions of the Pastoral Plan's proposed contents, and all documents relating to its implementation, JA 70, ¶ 2; (3) all "Church Bulletins, clergy Bulletins, Pastoral letters, directives, memo-

randa, or similar documents issued or promulgated by any" bishop in the United States to any other person concerning the Pastoral Plan, JA 70, ¶ 6; (4) all documents reflecting contact with any candidates for public office anywhere in the United States, JA 71, ¶ 8; (5) all documents reflecting financial support or "involvement" of USCC/NCCB, "or any state Catholic conference, archdiocese, diocese, or parish church," or any "church personnel" (defined to include every employee of each of those organizations), with twelve national and state pro-life organizations, JA 72, ¶ 10; (6) USCC/NCCB's tax or information returns and, "without limitation, all correspondence, memoranda or other communications relating to the consideration or approval by the Internal Revenue Service" of any application for section 501(c)(3) status, JA 73, ¶ 14; and (7) the identities of the presidents and executive secretaries of the Catholic conferences in sixteen states, and the identities of the bishops and directors of pro-life activities in eighteen dioceses for the years 1975 to the present, J.A. 71, ¶ 9.[3]

USCC/NCCB moved to quash the subpoenas on the ground, *inter alia*, that the plaintiffs lacked Article III standing, and the court was therefore without Article III power to issue and enforce the subpoenas. One year later, on April 4, 1984, the district court "summarily denied" the motion in a single sentence. JA 80. At the same time, the court denied the government's motion to stay all proceedings in the case pending this Court's decision in *Allen* v. *Wright*, 468 U.S. 737 (1984). JA 80.

After *Allen* was decided, the government renewed its motion to dismiss the complaint for lack of standing.

[3] The evident purpose of this last request—which would result in the identification of at least 25 bishops or archbishops, 47 auxiliary bishops and numerous others—was to identify witnesses to be deposed. JA 110. The plaintiffs have already indicated their intention to take the depositions of 17 individuals, 10 of whom are bishops or archbishops, and 3 of whom hold the rank of Cardinal. Court of Appeals Joint Appendix A 201.

The district court denied the motion on March 1, 1985, Pet. A. 93a-102a, and on July 15 denied the government's motion to certify the question of standing for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). JA 81.

D. Contempt Proceedings

On June 20, 1985, ARM moved to hold USCC/NCCB in contempt. USCC/NCCB moved for a protective order, arguing that the subpoenas raised substantial First Amendment issues that should not be faced while the government was attempting to secure appellate review. The court denied ARM's motion for contempt on September 5, but ordered USCC/NCCB to begin production of documents "forthwith."[4] JA 81.

USCC/NCCB then asked ARM to agree to a protective order governing the use of the documents. ARM refused and filed a renewed motion for contempt. The district court directed the parties to enter into a protective order, denied plaintiffs' motion for contempt, and stayed compliance with the subpoenas pending the court of appeals' disposition of a petition for a writ of prohibition or mandamus that had been filed by the government. JA 83-84. The court of appeals summarily denied that petition on January 14, 1986. *In re Baker*, 788 F.2d 3 (2d Cir. 1986).

ARM once again renewed its motion to hold USCC/NCCB in contempt. On February 26, 1986, the district court denied the renewed motion, but ordered USCC/NCCB to begir production of documents on March 7, 1986. JA 87. On March 6, 1986, USCC/NCCB delivered to the district judge a letter explaining that they could not, in conscience, produce the subpoenaed records because of their belief that the court lacked jurisdiction to issue the subpoenas. Court of Appeals Joint Appendix

[4] The district court ordered ARM to "narrow" two document requests relating to the minutes of bishops' meetings. Those documents were not required to be produced "at this time." JA 81-82.

A 369-71. ARM then renewed its motion to hold USCC and NCCB in contempt. JA 88. USCC/NCCB responded with affidavits detailing the reasons for their refusal to comply with the subpoenas. JA 96-112.

On May 8, 1986, the district court granted ARM's motion, held USCC/NCCB in civil contempt, and imposed a fine of $50,000 per day against each organization for each day the documents were not produced. Pet. A. 44a-51a. The sanctions have been stayed throughout the course of the appellate proceedings. Pet. A. 52a-53a, 105a-107a, 108a-111a.

E. USCC/NCCB's Appeal

USCC/NCCB appealed from the civil contempt order on the ground that the district court lacked subject matter jurisdiction to entertain the suit or to issue and enforce its subpoenas. On June 4, 1987, a divided panel of the court of appeals affirmed. "A lack of subject matter jurisdiction," the majority announced, "does not disable the district court from exercising all judicial power." Pet. A. 12a. Relying principally on a 1919 grand jury case, *Blair* v. *United States*, 250 U.S. 273 (1919), the majority held that "[w]ith respect to jurisdiction over the underlying action . . . the witness may make only the limited challenge as to whether there exists a *colorable basis for exercising subject matter jurisdiction*, and not a full-scale challenge to the correctness of the District Court's exercise of such jurisdiction." Pet. A. 1a, 10a (emphasis added). In one paragraph, the court then found that "colorable jurisdiction" existed. Pet. A. 19a-20a.

Judge Cardamone dissented,[5] emphasizing this Court's statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950), that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." Pet. A. 24a. He concluded that "both traditional constitutional principles and case law make clear the District Court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit." Pet. A. 27a. Consequently, he concluded that USCC/NCCB could challenge the lawfulness of the subpoenas based upon the absence of subject matter jurisdiction. Indeed, citing *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986), Judge Cardamone stressed that "[w]holly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority." Pet. A. 30a.

[5] Judge Kearse filed a brief concurring opinion, emphasizing that the court's jurisdiction to determine jurisdiction must include the ability to compel evidence designed to establish standing. Pet. A. 42a. But the discovery sought through these subpoenas relates only to the merits of the asserted claims, not to standing or any other aspect of jurisdiction.

SUMMARY OF ARGUMENT

The plaintiffs in this case lack Article III standing to challenge the tax-exempt status of the Roman Catholic Church. The district court was, therefore, without "judicial Power" under Article III to issue subpoenas seeking discovery on the merits, or to enforce those subpoenas through civil contempt.

I. The judicial subpoena power is an element of the "judicial Power" conferred by Article III. See, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-42 (1950). As such, it is limited by Article III's requirement of a case or controversy. If there is no case or controversy, there is no judicial power to issue a subpoena or to compel compliance through civil contempt. This Court has repeatedly held that " 'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.' "

United States v. *United Mine Workers*, 330 U.S. 258, 291 (1947), quoting *United States* v. *Shipp*, 203 U.S. 563, 573 (1906). Indeed, this Court has held that a civil contempt order cannot stand if for any reason the underlying order was "erroneously issued" or "beyond the jurisdiction of the court." *United Mine Workers*, 330 U.S. at 295. That principle surely applies when, as in this case, the jurisdictional defect is the absence of Article III power.

The court of appeals' conclusion that "colorable" jurisdiction is sufficient to justify the issuance of a subpoena and the imposition of civil contempt sanctions was based upon a misreading of *United Mine Workers*. Recognizing that courts necessarily have jurisdiction to decide their own jurisdiction, this Court in *United Mine Workers* held that criminal contempt may be imposed for violating orders entered "to preserve the existing conditions" pending a determination as to jurisdiction—as long as the claim of jurisdiction is "substantial" and "not frivolous." *Id.* at 291, 293. But the subpoena in this case was not entered to facilitate a decision on jurisdiction, or to preserve existing conditions pending such a decision. In fact, the district court had already decided, erroneously, that it had jurisdiction.

The court of appeals itself recognized that if the lack of Article III power disables a court from issuing a subpoena, then the witness to whom a subpoena is addressed may challenge it on the ground that Article III power is lacking. Indeed, even if the witnesses in this case had not challenged the court's Article III power to subpoena them and hold them in contempt, the district court and the appellate courts would have been required to raise the issue *sua sponte*. See, *e.g.*, *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986).

II. That the district court was without judicial power under Article III is clear. In this case, as in *Allen* v. *Wright*, 468 U.S. 737 (1984), and *Simon* v. *Eastern*

Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), the plaintiffs lack Article III standing to challenge the tax-exempt status of third parties, because they cannot establish that they suffered "distinct and palpable" "personal injury" that was "fairly traceable" to the grant of a tax exemption and "likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. The claim of the clergymen that they have somehow been "denigrated" by the IRS's failure to revoke the tax-exempt status of the Roman Catholic Church is insubstantial. The IRS has neither endorsed Catholicism nor stigmatized those who practice other religions. And even if the clergy plaintiffs can be said to have suffered some undefined stigma, that is constitutionally insufficient to support standing because they were not "*personally* denied equal treatment" or "'*directly affected* by the laws and practices against which their complaints are directed.'" *Allen*, 468 U.S. at 755 (emphasis added); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 487 n.22 (1982), quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).

Nor is the plaintiffs' claim of voter standing sufficient under Article III. Unlike the plaintiffs in *Baker v. Carr*, 369 U.S. 186 (1962), these plaintiffs do not allege any diminution in their representation or impairment of their right to vote. And it is entirely "speculative" whether revocation of the Catholic Church's tax exemption "would have a significant impact" on the plaintiffs' ability to accomplish their political objectives. *Allen*, 468 U.S. at 758.

In this case, as in *Valley Forge*, *Allen*, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 228 (1974), and other cases, the plaintiffs "fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an

injury sufficient to confer standing under Art. III . . . ." *Valley Forge*, 454 U.S. at 485 (emphasis in original).

Finally, recognizing standing in this case would intrude the Judiciary into the enforcement prerogatives of the Executive Branch, in disregard of the constitutional separation of powers and the elaborate statutory framework established for enforcement of the tax code.

ARGUMENT

The plaintiffs in this case, a group of individuals and organizations who oppose the Roman Catholic Church's position on abortion, challenge the tax-exempt status of the Roman Catholic Church in the United States. In pursuit of their purported claims, they seek massive discovery from the two national organizations of Catholic bishops. These efforts by legal bystanders to invoke the judicial power against the Catholic Church fly in the face of Article III of the Constitution and the precedents of this Court.

I. USCC/NCCB MAY CHALLENGE THE COURT'S ARTICLE III POWER

A. A Court Without Article III Power Cannot Issue A Subpoena Or Coerce Compliance Through Civil Contempt

In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 475-76 (1982), this Court stated the fundamental principle that governs this case:

> [O]f one thing we may be sure: Those who do not possess Article III standing may not litigate as suitors in the courts of the United States.

The absence of Article III standing not only disables plaintiffs from securing a judgment; it bars them from "litigat[ing] as suitors" in the federal courts. *Ibid.* That means, among other things, that they may not invoke the court's process to compel testimony, and they may not seek civil contempt orders to assist them in litigation. The power to subpoena witnesses in a civil case,

and to hold them in civil contempt, is part of the "judicial Power" conferred by Article III, and that power extends only to cases and controversies.

The court of appeals majority rejected this basic principle of constitutional law. The majority explicitly "disagree[d]" with "the contention of the [USCC/NCCB] and the federal defendants that the lack of subject matter jurisdiction over the underlying lawsuit impairs the power of the district court to order the witnesses to produce evidence and to adjudicate them in contempt for their refusal." Pet. A. 12a. The majority explained:

> If the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance, then we would agree that the witness would have standing to assert such a claim on appeal from an adjudication of contempt. We disagree, however, with the premise. *Ibid.*

The majority held that the power to issue subpoenas and impose civil contempt penalties for noncompliance are virtually free of Article III limitations: only a "colorable" claim of jurisdiction is necessary to sustain the issuance of a subpoena and the imposition of civil contempt. Pet. A. 18a. That conclusion was erroneous. When a claim of jurisdiction is "colorable," the court's power to decide jurisdiction can support limited discovery *on the issue of jurisdiction*, as well as orders preserving existing conditions *pending* a decision on jurisdiction. But the court's necessary power to decide jurisdiction cannot support discovery, like that involved here, relating solely to the merits. When, as in this case, it can be readily determined without the subpoenaed information that jurisdiction—indeed, Article III power—is lacking, that lack of power extends to the issuance of the subpoenas and the imposition of civil contempt for noncompliance.

1. *The Subpoena Power and Civil Contempt Power Are Subject to Article III*

In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), this Court made clear that the judicial subpoena power is an element of the "judicial Power" conferred by Article III, and is therefore limited by the requirement of a case and controversy.

> Federal judicial power itself extends only to adjudication of cases and controversies . . . . The judicial subpoena power not only is subject to specific constitutional limitations, . . . but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

Id. at 641-42. In short, absent a case or controversy, there is no judicial power to issue subpoenas.[6] See also *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975); *United States* v. *Powell*, 379 U.S. 48, 57 (1964).

The power to issue civil contempt orders is likewise limited by Article III. If there is no judicial power under Article III to issue a subpoena, then there is no power to compel compliance through civil contempt. Civil contempt "is wholly remedial, [and] serves only the purposes of the complainant." *McCrone* v. *United States*, 307 U.S. 61, 64 (1939); see also *Penfield Co.* v. *SEC*,

[6] The court of appeals read *Morton Salt* as addressing only "discovery directed *at a party* that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit," not discovery directed at non-party witness. Pet. A. 17a (emphasis added). But *Morton Salt* addressed the "subpoena power," and subpoenas are ordinarily addressed to non-parties, not parties. Subpoenas are not necessary to secure discovery from parties. See Fed. R. Civ. P. 26-37. In any event, if, as the court of appeals majority conceded, the lack of Article III power disables a court from authorizing discovery from a party, it necessarily disables a court from subpoenaing a non-party. Article III sets limits on the judicial power, and that power is no greater over non-parties than over parties.

330 U.S. 585, 590 (1947); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). Its purpose here was to assist the plaintiffs in pursuit of their claim for relief. If the plaintiffs are without Article III standing to sue, however, they have no claim to the court's assistance, and the court has no power to provide it.

Proceedings for civil contempt "are instituted and tried as a part of the main cause," *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 445, and if there is no judicial power over the main cause there is no power to issue a civil contempt order. As Judge Cardamone concluded in his dissent, the courts' "power to issue a civil contempt order derives from and depends upon their subject matter jurisdiction over the underlying action." Pet. A. 23a.

There is nothing novel or uncertain about the principle that contempt sanctions may not be imposed for violations of orders that are beyond the power or jurisdiction of the court. The principle was recognized by this Court in a series of decisions a century ago. In *Ex parte Rowland*, 104 U.S. 604, 612 (1882), the Court held that "if the command [of an order] was in whole or in part beyond the power of the Court, the writ, or so much of it as was in excess of jurisdiction, was void, and the Court had no right in law to punish for any contempt for its unauthorized requirements." In that case, county commissioners had been held in contempt for refusing to obey a federal court order directing them to collect a special property tax. The order, this Court concluded, "was beyond the jurisdiction of the Circuit Court," *id.* at 616, and since the underlying order "was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying." *Id.* at 617-18.

Four years later, the Court repeated the point in *Ex parte Fisk*, 113 U.S. 713, 718 (1885):

> When . . . a court of the United States undertakes, by its process of contempt, to punish a man for re-

> fusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.

Finding that the Circuit Court was "without authority" to enter orders for the pretrial examination of the defendants, the Court concluded that it was "equally without authority to enforce these orders by process for contempt." *Id.* at 726.[7] See also *In re Burrus*, 136 U.S. 586, 597 (1890) (granting a writ of *habeas corpus* to individual held in contempt for violating a child custody order on the ground that the court had no jurisdiction over the case); *In re Sawyer*, 124 U.S. 200, 221 (1888) (granting a writ of *habeas corpus* to state officials held in contempt for disobeying a federal court order where the suit "relate[s] to a subject which the Circuit Court of the United States . . . has no jurisdiction or power over"); *Gompers* v. *Bucks Stove & Range Co.*, *supra* (reversing civil contempt judgment on ground that underlying dispute was settled).

In *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), this Court reaffirmed the principle that a civil contempt order cannot stand if the court lacks jurisdiction or power over the underlying action, or if for any reason the order that is disobeyed was "erroneously issued" or "beyond the jurisdiction of the court." *Id.* at 295.[8] In that case, a union and its president challenged

[7] The jurisdictional determinations in these cases were not made on appeal from judgments on the merits, but rather in *habeas corpus* proceedings aimed at the contempt orders. The cases proceeded by writ of *habeas corpus* because, prior to this Court's decision in *Alexander* v. *United States*, 201 U.S. 117 (1906), contempt judgments were not separately appealable. See *Ex Parte Fisk*, 113 U.S. at 718.

[8] This principle has been applied on countless occasions in the federal courts. See, *e.g.*, *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281 (9th Cir. 1987); *Blocksom & Co.* v. *Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978); *ITT Community Development Corp.* v. *Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978); *United States* v. *Thompson*, 319 F.2d 665 (2d Cir. 1963).

civil and criminal contempt orders entered for violation of a temporary restraining order against a strike. The temporary restraining order had been entered to preserve the *status quo* while the court considered the union's contention that the Norris-LaGuardia Act deprived the court of jurisdiction to issue an injunction against the strike.

This Court upheld the criminal and civil contempt orders on the ground that "the elements of federal jurisdiction [over the case] were clearly shown," *id.* at 294, and that the Norris-LaGuardia Act did not deprive the court of jurisdiction to issue a temporary restraining order. It concluded, however, that if the Norris-LaGuardia Act did place injunctive relief "beyond the jurisdiction of the District Court," *id.* at 289, the judgment of criminal contempt would be affirmed, while the judgment for civil contempt would be "set aside." *Id.* at 295.

The Court recognized, at the outset, the basic principle established by its earlier decisions: " 'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.' " *Id.* at 291, quoting *United States* v. *Shipp*, 203 U.S. 563, 573 (1906). The district court, however, " 'necessarily had jurisdiction to decide whether the case was properly before it,' " and " '[u]ntil its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions.' " *Ibid.* Disobedience of such orders, the Court held, "is punishable as criminal contempt" even if it develops that jurisdiction was lacking—but not if "the question of jurisdiction [was] frivolous and not substantial. . . ." *Id.* at 293.

Civil contempt, which is involved here, was regarded as a different matter. "If the Norris-LaGuardia Act

were applicable in this case," the Court concluded, "the conviction for civil contempt would be reversed in its entirety." *Id.* at 295. Civil contempt, as noted above, "is wholly remedial, [and] serves only the purposes of the complainant." *McCrone* v. *United States*, 307 U.S. at 64. And the complainant's "right to remedial relief falls with an injunction which events prove was *erroneously issued*, and *a fortiori* when the injunction or restraining order was *beyond the jurisdiction of the court*." *United Mine Workers*, 330 U.S. at 295 (emphasis added) (citations omitted).

United Mine Workers and *Morton Salt* together dictate the result in this case. *Morton Salt* makes clear that a court is without power to issue a subpoena absent a case or controversy, and *United Mine Workers* confirms the well-established principle that an order that is beyond the court's power or jurisdiction cannot sustain a judgment of civil contempt.[9]

2. *A "Colorable" Claim of Article III Power is Insufficient to Support the Issuance of the Subpoenas and Civil Contempt Order in this Case*

Citing *United Mine Workers*, the court of appeals majority concluded that a "colorable" claim of Article III power is always sufficient to support the issuance of a subpoena and the imposition of civil contempt for its disobedience. Pet. A. 18a. But neither *United Mine Workers* nor any other decision of this Court or any other court supports such a rule.

United Mine Workers simply recognized that when a non-frivolous claim of jurisdiction is made, the court necessarily has power to enter orders *necessary to enable*

[9] While the principal jurisdictional defect in this case is the absence of Article III power, *United Mine Workers* makes clear that a civil contempt order cannot stand if there is any jurisdictional defect in the underlying order. The jurisdictional issue in that case was a statutory one.

it to decide the question of jurisdiction, and to enforce those orders through criminal contempt. 330 U.S. at 293. But when, as in this case, the underlying order is not entered to facilitate a decision on jurisdiction, but rather to secure discovery on the merits, merely "colorable" jurisdiction cannot support civil or criminal contempt. In these circumstances, the general rule prevails: " 'orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.' " *Id.* at 291, quoting *Shipp*, 203 U.S. at 573. See *In re Green*, 369 U.S. 689, 692 (1962) ("state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption").[10]

There is no claim in this case that the subpoenas and contempt order were intended to assist the court in resolving the question of jurisdiction, or to preserve the *status quo* pending that determination. In fact, the district court had already made a determination that it had jurisdiction. USCC/NCCB's decision not to comply with the subpoenas did not frustrate the court's ability to decide the question of jurisdiction; to the contrary, it was the only means available to them to seek review of the jurisdictional basis for the subpoenas. See *United States* v. *Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). Nor would compliance with the subpoenas have preserved the *status quo;* compliance would have destroyed the existing con-

[10] When this Court has upheld *criminal* contempt convictions without regard to the correctness of the underlying order, it has emphasized that the court below had personal jurisdiction and subject matter jurisdiction—not merely "colorable" jurisdiction. *Walker* v. *City of Birmingham*, 388 U.S. 307, 315 (1967); *Howat* v. *Kansas*, 258 U.S. 181, 189-90 (1922). (*Howat* also upheld a civil contempt order—not, however, on the ground that the correctness of the underlying order was irrelevant, but rather on the ground that the particular constitutional challenge asserted did not affect the validity of the underlying order. 258 U.S. at 185-86.)

ditions by revealing the information USCC/NCCB sought to protect. See *Maness* v. *Meyers*, 419 U.S. 449, 460 (1975).

The suggestion that colorable jurisdiction is all that is necessary to sustain the subpoena and civil contempt powers in these circumstances is unsupported by case law or necessity. There are, in fact, compelling reasons to insist that the burdens of discovery and civil contempt not be imposed if the Constitution deprives the court of power to resolve the underlying dispute. The burdens and costs of discovery may be more significant from a practical standpoint than the actual outcome of the case—in particular when, as in this case, sensitive internal information is sought. In some cases, the desire to pursue discovery may be the reason for bringing a lawsuit in the first place. The burdens of civil contempt, as the $100,000 daily fine in this case illustrates, can be even greater. The sensible rule—and the rule required by the Constitution—is that a court without Article III power to decide a matter is also without Article III power to issue and enforce subpoenas that can only be justified by the need to prepare the matter for decision on the merits.

B. USCC/NCCB Are Not Precluded From Challenging The Court's Article III Power

The court of appeals held that USCC/NCCB did not have what it called "standing" to challenge the district court's Article III power over the lawsuit. Pet. A. 8a, 12a, 15a. But that conclusion was premised upon its erroneous view that the absence of Article III power "does not disable" the court from issuing subpoenas and civil contempt orders. Pet. A. 12a. Even the court of appeals majority recognized that if Article III power is necessary to support a judicial subpoena, then USCC/NCCB do "have standing" to challenge the court's Article III power. Pet. A. 12a. There is, then, no real issue of USCC/NCCB's right to raise its jurisdictional defense.

1. *"Standing" Is Not Necessary To Point Out the Court's Lack of Article III Power*

Any suggestion that USCC/NCCB lack "standing" to challenge the court's Article III power reflects a misunderstanding of the requirements of Article III. The existence of "judicial Power" under Article III is not a matter to be considered only when raised by an interested party. Article III power is always at issue, as is subject matter jurisdiction generally, and must be considered whenever and by whomever it is raised—indeed, whether it is raised at all. Federal Rule of Civil Procedure 12(h)(3) makes that clear:

> Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Emphasis added).

A federal court is obliged to examine its possible lack of subject matter jurisdiction whether the matter is raised by a party, by a witness, or by the court on its own initiative—and whether it is raised when the complaint is filed, in the course of discovery, in the midst of trial, or on appeal. Thus, in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986), this Court vacated the judgment of the court of appeals on the ground, never asserted by any of the parties, that the appellant lacked Article III standing. The Court explained:

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

475 U.S. at 541, quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934) (citation omitted).

The question of jurisdiction is so "fundamental" that "the Court is bound to ask and answer [it] for itself, even when not otherwise suggested, and *without respect to the relation of the parties to it.*" *Bender*, 475 U.S. at 547, quoting *Mansfield C. & L.M.R. Co.* v. *Swan*, 111 U.S. 379, 382 (1884) (emphasis added).[11] See also *Hodel* v. *Irving*, 107 S.Ct. 2076, 2080 (1987) (raising, *sua sponte*, Article III and prudential limitations on standing); *Juidice* v. *Vail*, 430 U.S. 327, 331-33 (1977) (standing); *United States* v. *Corrick*, 298 U.S. 435, 440 (1936) (statutory jurisdiction). It necessarily follows that the court is bound to answer the question of jurisdiction when it is "suggested" by anyone, party or witness.

2. *USCC/NCCB Have "Standing" To Point Out the Court's Lack of Article III Power*

Even if some sort of "standing" were required to raise the district court's lack of Article III power, it certainly would not be lacking in this case. USCC/NCCB can show that they suffer " 'actual or threatened injury as a result of' " the Court's exercise of purported Article III power against them, and that their injury is " 'redressable by the court.' " *Bender*, 475 U.S. at 542 (citations omitted).

---

[11] The court of appeals majority read *Bender* as requiring a reviewing court to consider jurisdiction over the underlying action only on an appeal from a final judgment in the underlying action. Pet. A. 16a. But that reading of *Bender* simply reflects the majority's erroneous view that the subpoena and civil contempt powers do not depend on the existence of Article III power over the underlying suit. See Pet. A. 12a. And since *Bender* makes clear that the obligation to consider jurisdiction "is inflexible and without exception," applying "in all cases" and "[o]n every writ of error or appeal," 475 U.S. at 547, quoting *Mansfield C. & L.M.R. Co.* v. *Swan*, 111 U.S. at 382, the district court's Article III power must be examined on this appeal.

The judicial subpoena and civil contempt powers have been invoked to compel USCC/NCCB to produce voluminous internal church documents to outspoken critics of the Catholic Church. Noncompliance with the subpoenas has resulted in daily fines of $100,000, and "[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information is released." *Maness* v. *Meyers*, 419 U.S. at 460. Even in the ordinary case, a witness may challenge a subpoena on the ground that it is "unduly burdensome or *otherwise unlawful*" and, if contempt is ordered, he may "obtain full review of his claims before undertaking any burden of compliance with the subpoena." *United States* v. *Ryan*, 402 U.S. at 532, 533 (emphasis added); see also *Cobbledick* v. *United States*, 309 U.S. at 328. A subpoena that is beyond the power of the court is "unlawful," and that is necessarily an issue that any witness may raise.[12]

In this case, USCC/NCCB have an especially strong interest in challenging the court's power to issue the subpoenas, for the exercise of that power has an undeniable impact upon the Catholic Church's rights of free speech and free exercise of religion. Churches and other religious organizations rightly consider it their obligation to speak out on the moral aspects of social, economic and political issues. The Roman Catholic Church is no exception. The bishops who comprise the USCC/NCCB have stated that

> [i]t is the Church's role as a community of faith to call attention to the moral and religious dimension

---

[12] The court of appeals majority believed that a witness may only raise legal objections that "concern[] the witness personally." Pet. A. 10a. But when a contempt order is entered, "the matter *becomes personal* to the witness and a judgment as to him." *Alexander* v. *United States*, 201 U.S. 117, 122 (1906) (emphasis added). At that point, if not before, all issues affecting the validity of the court's exercise of power—including the existence of judicial power—"concern the witness personally."

> of secular issues, to keep alive the values of the Gospel as a norm for social and political life, and to point out the demands of the Christian faith for a just transformation of society.[13]

The right of religious organizations to address such issues is well established. "Adherents of particular faiths and individual churches frequently take strong positions on public issues. . . . Of course, churches as much as secular bodies and private citizens have that right." *Walz* v. *Tax Commission*, 397 U.S. 664, 670 (1970); see also *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *id.* at 640 (Brennan, J., concurring).

Forcing the Roman Catholic bishops of the United States to disclose internal documents to persons who oppose the Church's religious teaching on abortion would intrude upon the Church's exercise of its First Amendment rights in the past and discourage the full expression of those rights in the future. Cf. *NAACP* v. *Alabama*, 357 U.S. 449 (1958). In fact, the Church's religious liberty and freedom of expression are threatened by the very pendency of this action, which seeks to strip USCC/NCCB and the Catholic Church in general of their tax exemptions based on activities allegedly undertaken to promote their religious beliefs.[14] No one has a greater interest in establishing the court's lack of power

---

[13] *Political Responsibility: Choices for the Future, A Statement of the Administrative Board of the USCC* 4 (September 1987). This statement addresses the following issues in addition to abortion: arms control and disarmament, capital punishment, civil rights, the economy, education, family life, food and agricultural policy, health, housing, human rights, immigration and refugee policy, mass media, and regional conflict in the world.

[14] Recognizing the sensitivity of inquiries into a church's compliance with the Internal Revenue Code, Congress has placed strict limitations upon church tax inquiries and examinations. 26 U.S.C. § 7611 (1987); see H.R. Conf. Rep. No. 861, 98 Cong., 2d Sess. 1101-1114 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 1445, 1789-1802. See p. 45-46, *infra*.

over this case than USCC/NCCB. They are, after all, the real targets of the suit.

3. *The Court of Appeals Misread* Blair *v.* United States

Much of the majority's analysis was based upon an unprecedented expansion of this Court's decision in *Blair* v. *United States*, 250 U.S. 273 (1919). That case concerned the broad investigative power of the grand jury, which, unlike a court in a civil case, "does not depend on a case or controversy for power to get evidence." *United States* v. *Morton Salt Co.*, 338 U.S. at 643. See also *United States* v. *Bisceglia*, 420 U.S. at 148; *United States* v. *Powell*, 379 U.S. at 57. *Blair* simply did not address the more limited judicial subpoena power conferred by Article III.

Blair held that a witness could not object to a grand jury subpoena by attacking the constitutionality of the statute he speculated was the basis of the investigation. The reason stemmed from the nature of a grand jury proceeding. The grand jury is an investigative body and, as this Court explained, the witness "is not entitled to set limits to the investigation that the grand jury may conduct." 250 U.S. at 282. The "examination of witnesses by a grand jury need not be preceded by a formal charge." *Ibid.* Indeed, the "question whether the facts show a case within [the grand jury's] jurisdiction" and, if so, the "precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282-83 (citation omitted). It is premature and speculative for a witness to anticipate these matters by raising a constitutional challenge to a statute that may or may not be invoked against him.

The grand jury witness, in other words, is "not interested" to challenge the constitutionality of such a statute, *id.* at 279, because a successful challenge "would not give the witness the relief he sought." Pet. A. 34a (Cardamone, J., dissenting). The grand jury could subpoena

him anyway, because the "jurisdiction" of the grand jury does not depend upon the constitutionality of any particular statute that may have been violated.

Because a court in a civil case, unlike a grand jury, depends on a case or controversy for its power to get evidence, the subpoenaed witness may challenge the existence of a case or controversy. And ordinarily such a challenge cannot be dismissed as premature or speculative. Unlike a grand jury proceeding, a civil case is initiated by a formal complaint that must satisfy the requirements of Article III. The precise nature of the claim is stated "at the beginning" of the case, not at its "conclusion." *Id.* at 282. And in the ordinary civil case, unlike a grand jury proceeding, it can be determined at the outset "whether the facts show a case within [the court's] jurisdiction." *Id.* at 283. Of course, if the court's jurisdiction is uncertain, the court has power to order discovery to determine its jurisdiction. But when, as in this case, it can be determined at the outset whether the court has Article III power, there is nothing in *Blair* that bars the witness from raising the issue, or that disables the court from deciding it.[15]

II. THE DISTRICT COURT WAS WITHOUT ARTICLE III POWER BECAUSE THE PLAINTIFFS LACKED ARTICLE III STANDING

This Court's prior standing decisions make clear that Article III power is lacking in this case, and that the contempt judgments therefore must be set aside. Indeed,

[15] A recent decision underscores the limited scope of *Blair*, even in the grand jury context. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). Distinguishing the "speculativ[e]" challenge asserted in *Blair*, the court held that a grand jury witness may defend against a grand jury subpoena and subsequent contempt charge by challenging the authority of the prosecutor to act. *Id.* at 779. See also *In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirlomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975).

applying the court of appeals' test, the claim of standing here is not even "colorable."

Lawsuits challenging the tax status of others "are rarely if ever appropriate for federal-court adjudication." *Allen* v. *Wright*, 468 U.S. 737, 760 (1982). This case dramatically illustrates why. None of the plaintiffs here alleges that his own tax status is in jeopardy. None wishes to change his tax status. None claims that he has tried to do what he contends the Catholic Church does, only to be threatened by the government. In short, none alleges improper or unequal treatment at all by the government. Nevertheless, each of the plaintiffs attacks the government's treatment of some 30,000 Roman Catholic Church entities, the vast majority of which are located nowhere near the communities in which the plaintiffs reside. Even if all of the plaintiffs' allegations were true, revoking the tax-exempt status of these Church entities would not confer any benefit, or relieve any burden, on the plaintiffs.

In fact, in the final analysis, a judgment in the plaintiffs' favor in this case would accomplish virtually nothing. The Catholic Church entities are not parties, and would not be bound by any judgment. They have a statutory right, which they would undoubtedly invoke, to bring a separate declaratory judgment action to determine the legality of any revocation of their tax exemption. 26 U.S.C. § 7428. The issue of their eligibility for tax-exempt status would be relitigated *de novo*. Thus, the "controversy" over the tax-exempt status of the Roman Catholic Church in the United States, if indeed there is one, would not be resolved by this lawsuit. Any judgment would serve, at most, as advice for the court that would have to decide the controversy in litigation between the only parties whom it concerns.

A. Unaffected Third Parties Lack Article III Standing To Challenge the Tax-Exempt Status of Others

This Court has repeatedly insisted that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (citations omitted). "The injury alleged must be . . . " 'distinct and palpable,' " and not 'abstract' or 'conjectural' or 'hypothetical.' " *Allen* v. *Wright*, 468 U.S. at 751 (citations omitted). This Court has thus refused to entertain a variety of suits premised only upon "the value interests of concerned bystanders," *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973), or upon " 'the right, possessed by every citizen, to require that the Government be administered according to law.' " *Valley Forge*, 454 U.S. at 482-83, quoting *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937).[16]

---

[16] In *Valley Forge*, 454 U.S. at 482-85, and *Allen* v. *Wright*, 468 at 754-56, the Court made clear that it is Article III itself, not merely the prudential limitations on standing, that bars suits based on the generalized right to have the government act in accordance with the law. But even if the principle were treated as a prudential limitation, the witnesses here would be entitled to raise it. The prudential limitations on standing are "closely related to Art. III concerns," *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), and sufficiently "jurisdictional" that they must be considered by the court even if they are not raised by a party. See *Hodel* v. *Irving*, 107 S.Ct. 2076, 2080 (1987). It necessarily follows that those limitations may be raised by an alleged contemnor, who is entitled to challenge the underlying order as "erroneously issued" or "beyond the jurisdiction of the Court." *United Mine Workers*, 330 U.S. at 295.

Based on these principles, this Court has twice rejected challenges to the tax-exempt status of third parties, when the would-be plaintiff's own tax status is not in issue. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), indigent persons challenged a revenue ruling that a non-profit hospital could qualify for recognition as a charitable organization under section 501(c)(3), even though it provided only emergency room service to persons unable to afford hospitalization. This Court acknowledged the plaintiffs' interest in obtaining hospital services, and even acknowledged that some plaintiffs had been injured by the hospitals in question. *Id.* at 40-41. Nevertheless, the Court held that those facts were insufficient to establish a case or controversy with the Treasury, because the plaintiffs had failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.' " *Id.* at 45, *quoting Warth* v. *Seldin*, 422 U.S. at 505.

Similarly, in *Allen* v. *Wright*, 468 U.S. 737 (1984), the Court held that parents of black public school children lacked standing to challenge the lawfulness of the IRS's grant of tax-exempt status to allegedly discriminatory private schools. "[S]tigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" was insufficient to support standing, the Court held. *Id.* at 754. The plaintiffs also claimed that they had standing because the government's administration of the tax laws "diminished [their children's] ability to receive an education in a racially integrated school." *Id.* at 756. The Court recognized the "serious" nature of that injury, and "the constitutional importance of curing" it, but held that the injury could not support standing because it was "not fairly traceable to" the challenged granting of tax exemptions. *Id.* at 756-57. It was "entirely speculative," the Court explained, that any judg-

ment in the plaintiffs' favor "would have a significant impact on the racial composition of the public schools." *Id.* at 758.

Like the plaintiffs in *Simon* and *Allen*, the plaintiffs here are unhappy because, they assert, the IRS has not enforced section 501(c)(3) against others in the way they would like. The injuries these plaintiffs allege, however, are more abstract than those asserted in *Simon* and *Allen*. While those plaintiffs complained of the denial of medical services, and of the opportunity for an integrated education, these plaintiffs claim only some vague impairment of their stakes as voters and clergymen who oppose the Catholic Church's religious teaching on abortion. Allegations such as those made by the plaintiffs here could be made by virtually anyone who disagrees with the Catholic Church's position on abortion—or, for that matter, by virtually anyone who disagrees with the statements of any religious organization on a broad range of moral issues that confront the American public. See fn. 13, *supra*. Under this Court's precedents, such allegations are insufficient to confer standing.

B. The Clergy Plaintiffs Lack "Establishment Clause Standing"

The plaintiffs who are clergymen claim that the government's alleged failure to enforce the tax code against the Catholic Church violates their "sincere and deeply held belief in the separation of church and state," JA 45; see also JA 52, and their "right to live in a society in which no religion is favored or established by the state." JA 44; see also JA 54. These allegations, however, are no different from the allegations rejected as an insufficient basis for standing in *Valley Forge*. In that case, this Court held that citizens and taxpayers lacked standing under Article III to challenge the conveyance of surplus federal property to a religious college. The Court acknowledged the plaintiffs' commitment to separation of church and state, but held that they

> fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms.

454 U.S. at 485-86 (emphasis in original). Here, as in *Valley Forge*, the plaintiffs "cannot . . . satisfy the requirements of Art. III" by alleging injury to a generalized "right to a government that 'shall make no law respecting the establishment of religion.'" *Id.* at 482-83. See also *Allen*, 468 U.S. at 754; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 217, 226-27.

The district court in this case stated, however, that the clergy plaintiffs and the church-affiliated Women's Center for Reproductive Health had alleged a "spiritual injury" flowing from "the tacit government endorsement of the Roman Catholic Church position on abortion." Pet. A. 67a, 68a. Their beliefs were somehow "denigrated," and their ministries "frustrate[d]," the district court concluded, by government endorsement of a [contrary] theology." Pet. A. 68a. The amended complaint contains no such allegations of denigration or stigma, however, and the affidavits of the clergy plaintiffs contain only the vaguest of assertions on the subject.[17] Standing,

---

[17] The affidavit of one clergy plaintiff states, for example, that the IRS "seems to have done nothing about" instances in which Catholic priests have "denounced candidates from the pulpit," and that the IRS's failure to act

> denigrates my standing and the standing of my religion in the community. We are made to feel that we are second class citizens because we are not permitted to violate the law with impunity and because the government appears to consider our views not to be as worthy of attention as those of the Catholic Church. JA 44.

[Continued]

in any event, cannot be predicated upon the district court's conclusions for two reasons: (1) as a matter of law, the plaintiffs have suffered no cognizable denigration or stigma; and (2) even if they have, they have not alleged that it has resulted from their having been "personally denied equal treatment." *Allen*, 468 U.S. at 755.

First, the IRS cannot be said to have "endorsed" the Catholic Church's view on abortion, tacitly or otherwise. And it certainly has not made "an unequivocal statement of preference" for the Catholic religion generally, as the district court suggested. Pet. A. 69a. All churches represented by the plaintiffs—and countless other churches as well—enjoy tax-exempt status under section 501(c)(3). The allegation here is simply that the IRS has not applied the political activity limitation of section 501(c)(3) against the Catholic Church in the manner that these plaintiffs would like. Even if the plaintiffs' allegations are accepted as true, the IRS's alleged failure to take the demanded enforcement measures falls far short of an "unequivocal" or even "tacit" "endorsement" of the Catholic Church's theology. Pet. A. 68a, 69a. The alleged enforcement failure could have been based on any of a number of considerations—if, indeed, there has been a conscious decision at all. As a matter of law, the failure to revoke the Catholic Church's tax exemption cannot be said to stigmatize or denigrate non-Catholics.

The suggestion of stigma or denigration in this case pales by comparison to the comparable allegation rejected in *Allen*. The plaintiffs in *Allen* complained of racial discrimination, which historically has carried with

---

[17] [Continued]

There is no suggestion anywhere, however, that any of the clergy plaintiffs has been stopped from doing anything that Catholic clergy have allegedly done. See note 18, *infra*.

Another clergy plaintiff states that "it appears that Catholic doctrine is being favored by the government and, therefore, must be more correct than my religion's teachings." JA 47.

it an undeniable mark of perceived inferiority. The allegation of stigma in *Allen*, while too generalized to support standing, was nonetheless genuine. By contrast, the suggestion of "denigration" here is baseless.

Second, even if the clergy plaintiffs were assumed to have suffered "stigma" as a result of the IRS's treatment of the Catholic Church, that "stigma" would not support standing because it was not the result of any action directed against the clergy plaintiffs personally or even against their religions. In *Allen*, this Court emphasized that even when racial stigma is alleged, "[stigmatic] injury accords a basis for standing only to 'those persons who are *personally denied equal treatment*' by the challenged discriminatory conduct." 468 U.S. at 755 (emphasis added) (citation omitted).

The clergy plaintiffs in this case make no such claim. They allege no enforcement or threatened enforcement of the tax code against themselves personally or against their churches. They do not allege that they have engaged in activities similar to those allegedly engaged in by Catholic Church entities, only to be denied tax exemptions. Nor do they claim that they have been subjected to any unequal or unfair treatment whatscever by the IRS.[18] Indeed, the district court denied the plaintiffs what it termed "equal protection standing" precisely because "plaintiffs . . . do not assert that the code has been applied to them discriminatorily or that they have been de-

---

[18] The clergy plaintiffs complain simply that they are "law-abiding clergymen" who voluntarily "refrain from participating in political campaigns for fear of losing the tax exemption of their congregations and churches," Amended Complaint ¶ 42, JA 15-16, while the Catholic Church does not. But that is not an allegation that the IRS has subjected them to unequal or unfair treatment. Nor is the mere allegation that one has refrained from violating the law an allegation of injury that is cognizable under the law, even if it is alleged that others have violated the law without consequence.

nied some tax benefits to which they are entitled." Pet. A. 76a.

That same observation is fatal to the plaintiffs' claim of "Establishment Clause standing." In *Valley Forge* the Court explicitly rejected the notion "that enforcement of the establishment clause demands special exceptions from the requirement that a plaintiff allege *'distinct and palpable injury to himself'* . . . that is likely to be redressed if the requested relief is granted." 454 U.S. at 488 (citations omitted) (emphasis added). The Court also emphasized that a claimed "spiritual stake" in the government's alleged preference of a particular religion cannot support standing unless the plaintiffs can show that they were " *'directly affected* by the laws and practices against which their complaints are directed.' " 454 U.S. at 486-87 n.22, quoting *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963) (emphasis added).[19]

The plaintiffs here were not "directly affected" by the IRS action against which their complaint is directed. *Ibid.* Like the plaintiffs in *Valley Forge*, they can claim nothing more than an abstract "spiritual stake" in blocking the conferral of a benefit on a religious group to

[19] The district court thought that the clergy plaintiffs satisfied this requirement of *Valley Forge* and *Schempp* because, in its words, the IRS's action had allegedly "diminish[ed] their position in the community, encumber[ed] their calling in life, and obstruct[ed] their ability to communicate effectively their religious message." Pet. A. 95a-96a. But that is simply a more elaborate way of saying that the clergy plaintiffs allegedly suffered stigma. It does not establish that the clergy plaintiffs were *"directly affected* by the [IRS action] against which their complaints are directed." *Valley Forge*, 454 U.S. at 487 n.22; *Schempp*, 374 U.S. at 224 n.9. In *Schempp*, the plaintiffs could show they were directly affected by the challenged laws and practices, "because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. There is no comparable claim here.

which they do not belong.[20] Whether the spiritual injury is described as a preference for one religion or denigration of others, it is insufficient to support standing. As this Court explained in *Valley Forge*, if such a claim were sufficient, then "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing." 454 U.S. at 486 n.22.

Allowing these clergy plaintiffs to sue the IRS when they themselves have not been "directly affected" by the IRS's actions, *Valley Forge*, 454 U.S. at 487 n.22, or "personally denied equal treatment," *Allen*, 468 U.S. at 755, would have precisely the same consequences that the Court feared in *Allen*. "If the abstract stigmatic injury [asserted here and in *Allen*] were cognizable, standing would extend nationwide to all members of the . . . groups" that feel denigrated. 468 U.S. at 755-56.[21] This case proves the Court's point. A minister in New York is challenging the tax exemption of the Archdiocese of San Antonio, Texas, and a women's center in Jacksonville, Florida is contesting the government's alleged failure to monitor a parish priest in South Dakota. JA 7, 12. As the Court noted in *Allen*, "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *Id.* at 756, quoting *United States* v. *SCRAP*, 412 U.S. at 687.

C. Plaintiffs Have No "Voter Standing"

Plaintiffs claim no cognizable personal injury as voters, much less one that is "fairly traceable" to the IRS's conduct and "likely to be redressed" by judicial action.

[20] The plaintiffs in *Valley Forge* were not clergy members, but surely the result would have been no different if they had been. As the Court noted, standing "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." 454 U.S. at 486.

[21] In many, if not most, Establishment Clause cases, the allegedly "stigmatized" groups would include a majority of the population.

1. *Plaintiffs Have Suffered No Cognizable Injury as Voters*

Unlike the plaintiffs in *Baker* v. *Carr*, 369 U.S. 186 (1962), plaintiffs do not allege any diminution in their representation. Nor do they allege gerrymandering, ballot-box-stuffing, outright denial of their right to vote, or anything that dilutes the strength of their votes.[22] The plaintiffs therefore lack standing as "voters."

Nor do the plaintiffs acquire standing by presenting themselves more broadly as participants in the political process. At most, they can speculate that others *might* freely choose to vote against their preferred candidates based on information disseminated in the course of political debate, and that their candidates *might* actually be defeated. But that is not a cognizable injury; it is the essence of the democratic process. The injury is also entirely speculative; it can be neither proved nor disproved. Perhaps for that reason the plaintiffs do not make the claim that the alleged political activity of the Church has affected any particular election or even the total number of pro-abortion representatives.[23]

As the district court noted, plaintiffs allege simply that there is a "distortion in the political process" that somehow entitles them to challenge the Church's tax exemption, regardless of whether the distortion is likely to affect the outcome of any election. Pet. A. 73a. The plaintiffs, in the district court's words, allege that "members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and . . . each dollar contributed

---

[22] See, *e.g.*, *Davis* v. *Bandemer*, 106 S. Ct. 2797 (1986); *Karcher* v. *Daggett*, 462 U.S. 725 (1983); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900); cf. *United States* v. *Saylor*, 322 U.S. 385 (1944).

[23] As the district court noted, the claimed injury is "not actual loss of representatives vis-a-vis other groups" Pet. A. 75a n.10.

to the church is worth more than one given to non-exempt organizations." Pet. A. 73a.

The plaintiffs, however, are not recipients of campaign contributions alleging that their receipts have been adversely affected. They are voters and campaign contributors.[24] And they do not contend that their own contributions to political candidates ought to be tax deductible. They affirmatively disclaim that notion. Thus, the plaintiffs do not allege that they are being financially injured. They allege only that the Catholic Church is being financially benefited. And that allegation—that the government has improperly conferred a benefit upon a third party—is precisely the kind of claim that was rejected as an insufficient basis for standing in *Valley Forge*.

However it is described, the "distortion in the political process" alleged here is simply not a "distinct and palpable injury" to those who participate in the process as voters and contributors. *Warth* v. *Seldin*, 422 U.S. at 501. Such a "distortion" is no less abstract than the distortion of the legislative process found insufficient to support standing in *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*. In that case, citizens complained that allowing Armed Forces Reserve members to sit in Congress violated the Incompatibility Clause of the Constitution, which states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., Art. 1, § 6, cl.2. The alleged injury was a distortion of the legislative process in the form of "undue influence by the Executive Branch" on Reservist Members of Congress. 418 U.S. at 212. That distortion of the legislative

---

[24] The district court held that the organizational plaintiffs had standing as representatives of their voter members. Pet. A. 70a n.9, 91a.

process, the Court held, although concededly a matter in which citizens have "an interest," was "too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Id.* at 226-27.[25]

The same conclusion holds true here.[26] If the plaintiffs here could establish standing merely by alleging a distortion of the political process, then voters and contributors could challenge not only a great many IRS decisions, but virtually all Federal Election Commission decisions. The interest of the individual citizen in those decisions, however, is no greater than the generalized interest of the citizenry in "hav[ing] the Government act in accordance with law"—an interest that " 'cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' " *Allen*, 468 U.S. at 754, quoting *Valley Forge*, 454 U.S. at 483.

---

[25] The fact that the distortion of the legislative process might have impaired the effectiveness of the plaintiffs' own political activity—their lobbying to end the Vietnam war was allegedly frustrated by the presence of Reserve officers in the Congress—did not make a difference. The district court rejected the claim of standing based on the plaintiffs' political activity in opposition to the war, and the plaintiffs did not challenge that ruling in this Court. 418 U.S. at 210 n.1, 211, 216.

[26] The allegations here are also analogous to the allegation of "competitive injury, stemming from a systematic distortion of the marketplace," found insufficient to support a third-party tax challenge in *American Society of Travel Agents* v. *Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978). See *id.* at 159 (Bazelon, J., dissenting). A group of travel agents sued to revoke the tax-exempt status of the American Jewish Congress for engaging in competitive business activity allegedly prohibited by § 501(c)(3). The court found the allegation that the government had conferred an "unfair competitive advantage" on the tax-exempt organizations too "abstract" to constitute a "judicially cognizable 'injury in fact.' " *Id.* at 148-49. See also *Khalaf* v. *Regan*, 85-1 U.S. Tax Cases ¶ 9269 (D.D.C. 1985), *aff'd*, No. 83-02963 (D.C. Cir. Sept. 19, 1986) (unpublished opinion) (individuals and non-exempt political advocacy groups lack standing based on claim that tax-exempt status accorded to Jewish organizations disadvantaged them in pursuit of their political objectives).

2. *Plaintiffs' Claimed Injury Is Neither "Fairly Traceable" to the IRS Nor Likely To Be Redressed by the Requested Relief*

To the extent that the plaintiffs claim that the Church's alleged political activity has impaired their own ability to accomplish their political objectives, they encounter the same barrier as the plaintiffs in *Simon* and *Allen*:

> From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court . . . ."

468 U.S. at 757, quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 42. The IRS has not directly impaired the plaintiffs' political efforts; if anyone is alleged to have done so, it is "a third party not before the court," the Catholic Church. *Ibid.* And even the Church's alleged activities could have had only an indirect and speculative effect upon the plaintiffs' own political efforts.

In *Allen*, this Court held that the plaintiffs' alleged injury was not "fairly traceable" to the government, because it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." 468 U.S. at 758. It was "just as speculative whether any given parent would decide to transfer [his or her] child to public school" as a result of the school's loss of its tax-exempt status. *Ibid.* It was also "pure speculation" whether a sufficiently large number of such decisions would be made to have a "significant impact on the racial composition of the public schools." *Ibid.*

Similarly, in *Simon*, the Court found it "purely speculative" whether the alleged denial of medical services to indigents "fairly can be traced to [the IRS's action] or instead result from decisions made by the hospitals without regard to the tax implications." 426 U.S. at 42-43.

It was "equally speculative" whether a judgment against the IRS would cause the hospitals to provide more free services or instead to forego their tax exemptions. *Id.* at 43. Thus, the plaintiffs failed " 'to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief [would] remove the harm.' " *Id.* at 45, *quoting Warth* v. *Seldin*, 422 U.S. at 505. See also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973) (mother lacked standing to challenge non-prosecution of father for failure to pay child support, because it was "only speculative" that prosecution would result in payment of support).

Here too, "[s]peculative inferences are necessary to connect [the plaintiffs' alleged] injury to the challenged actions of [the IRS]." *Simon*, 426 U.S. at 45. It is speculative whether, or to what extent, the Church's donors would reduce their contributions if the Church's tax exemption were revoked. As plaintiffs themselves allege, contributions to the Church are "religiously-compelled," JA 16; therefore, they may be not responsive to tax pressure. It is equally speculative whether the Church would decide to stop the religiously-motivated activities that are under attack, such as "hand[ing] out 'right-to-life' leaflets with . . . church bulletin[s]." JA 13.[27]

Finally, it is speculative in the extreme whether all of the foregoing would lead to fewer pro-life votes. In *Winpisinger* v. *Watson*, 628 F.2d 133, *cert. denied*, 446 U.S. 929 (1980), the U.S. Court of Appeals for the D.C. Circuit held that supporters of Senator Edward Kennedy for the Democratic presidential nomination lacked standing to claim that members of President Carter's administration had illegally spent federal funds to promote the

[27] See note 13, *supra*, and accompanying text. Even if the Church were to cease any activity that it is now engaged in, it is speculative to suggest that its members would not feel an obligation to fill the void.

President's renomination. The plaintiffs' alleged harm was "the dilution of their efforts on Senator Kennedy's behalf by the actions of the federal defendants in utilizing the vast resources available to the Administration to promote President Carter's quest for renomination." *Id.* at 138. The Court held that there was no fairly traceable causal connection between the claimed injury and the challenged conduct. Its explanation is fully applicable here:

> The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event. In the case before us, whether [a plaintiff] is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to [the defendants]. Courts are powerless to confer standing when the causal link is too tenuous.

Id. at 139, citing *Linda R.S.* v. *Richard D.*, 410 U.S. at 618 (1972), and *Simon*, 426 U.S. at 45.

Plaintiffs effectively concede that it would be speculative to suggest that a judgment in their favor would alter the Church's conduct, much less result in the election of more pro-abortion candidates. They profess indifference to whether the Church modifies its alleged political activities in any way. "It is irrelevant," they assert, "whether the Church will continue to be active politically or if its members will increase their donations." Respondents' Brief in Opposition at 54. If, however, a judgment against the IRS would not alter the alleged political activities of the Church and its contributors, then the plaintiffs would gain nothing other than the psychological pleasure of knowing that the Church has lost its exemp-

tion. But that sort of satisfaction, this Court has made clear, is insufficient to support standing. *Allen*, 468 U.S. at 754; *Valley Forge*, 454 U.S. at 482-87; *Schlesinger*, 418 U.S. at 217, 226-27.[28]

In sum, the plaintiffs have failed to allege any distinct and palpable personal injury that is fairly traceable to the IRS's actions and likely to be redressed by a favorable decision.

D. The Doctrine Of Separation Of Powers And Related Prudential Concerns Preclude Standing

As in *Allen*, this Court "could not recognize respondents' standing in this case without running afoul of [a basic] structural principle"—namely, that "[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3." 468 U.S. at 761.[29] Enforcement decisions are "the special province of the Executive Branch." *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985). Even to require the IRS to investigate the tax status of the 30,000 Church entities involved in this case would result in the diversion of government resources from enforcement efforts that

[28] There is an additional reason why a judgment in this case would not alter the conduct of the Church or its contributors, and why the plaintiffs' alleged injury is not "likely to be redressed by the requested relief" in this case. *Allen*, 468 U.S. at 751. As noted above, at p. 27, even if the plaintiffs were to prevail, the Church entities, who are not parties in this case, would be entitled to litigate their tax-exempt status *de novo* in a separate declaratory judgment action under 26 U.S.C. § 7428. Even if that did not affect the plaintiffs' Article III standing, the inevitable duplication of judicial effort would present a prudential reason for declining to exercise the judicial power in this case. See note 16, *supra*.

[29] Even if the considerations discussed in this section do not establish an outright violation of the separation of powers doctrine, they present a prudential reason for declining to recognize the plaintiffs' standing. See note 16, *supra*; *Valley Forge*, 454 U.S. at 474-75.

would otherwise have been given a higher priority. See *ibid.* That intrusion of the courts into the law enforcement activities of the Executive Branch would itself undermine the constitutional separation of powers.

To require the IRS actually to take action against these Church entities would be an even greater intrusion into the prerogatives of the Executive, for "an agency's decision to . . . enforce . . . is a decision generally committed to an agency's absolute discretion." *Id.* at 831 (citations omitted). Absent an allegation that the government has failed "to enforce specific legal obligations whose violation works a direct harm," the courts are not empowered to second-guess the Executive Branch's enforcement activities. *Allen*, 468 U.S. at 761; see *Linda R.S.* v. *Richard D.*, 410 U.S. at 619 ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

Congress has delegated "the administration and enforcement of" the tax laws—including the power to "prescribe all needful rules and regulations"—to the Secretary and the Commissioner. 26 U.S.C. §§ 7801(a), 7805(a). Congress itself exercises oversight through the Joint Committee on Taxation. See 26 U.S.C. §§ 8001-8023. And while the courts obviously play an important role in the enforcement of the Code, their role is generally limited to resolving controversies that arise between a taxpayer and the IRS. See 26 U.S.C. §§ 6212-13, 6532, 7422; 28 U.S.C. § 1346. Indeed, when Congress authorized declaratory judgment actions for determinations of an organization's eligibility for a tax-exemption under section 501(c)(3), it expressly provided that such an action "may be filed only by the organization the qualification or classification of which is at issue." 26 U.S.C. § 7428(b)(1); see also 28 U.S.C. § 2201(a).[30]

[30] The district court dismissed the plaintiffs' claim for declaratory relief based on 26 U.S.C. § 7428 and 28 U.S.C. § 2201. Pet. A. 87a-

IRS determinations to grant tax-exempt status to an organization involve numerous discretionary judgments that are, as a general matter, inappropriate for judicial review at the behest of a mere bystander. There are, for example, six pages of regulations governing the threshold determination of whether an organization has a proper purpose within the meaning of section 501(c)(3). See 26 C.F.R. § 1.501(c)(3)-1 (1987). Implementation of the political activity limitation is itself a matter of considerable complexity.[31] For example, the IRS has determined that it is permissible for an exempt organization to publish voter guides stating the position of incumbents on a wide range of issues, or to distribute questionnaires to candidates on such issues. Rev. Rul. 78-248, 1978-1 C.B. 154. The Service has stated, however, that voter guides or questionnaires are impermissible if they "[e]vidence a bias on certain issues," or concentrate on a "narrow range of issues," even if not expressly stating support for, or opposition to, any candidate. *Ibid.* See also Rev. Rul. 80-282, 1980-2 C.B. 178.

91a. But the court rejected the argument of the government and USCC/NCCB that the plaintiffs' claim for injunctive relief was barred by those provisions, as well as the Anti-Injunction Act, 26 U.S.C. § 7421(a). *Ibid.* This Court left those questions open in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 34-35, 37, and *Bob Jones University* v. *Simon*, 416 U.S. 725, 732-33 n.7 (1974).

[31] A House Subcommittee recently found that the lobbying and political activity restrictions have

> given rise to a set of complex and at times inexact rules that are difficult to comply with and administer. The rules are complex because there are different rules for different types of organizations. The rules are sometimes inexact because of the imprecise definitions of lobbying and political activity. For example, it is often very difficult to distinguish lobbying or political activity from educational activity.

Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, 100th Cong., 1st Sess., *Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Organizations* 37 (Comm. Print 1987).

In applying section 501(c)(3), the IRS has developed a body of experience and expertise to which the courts owe deference.[32] An IRS judgment not to take enforcement action based on alleged violations of the requirements of section 501(c)(3) is generally "unsuit[ed] for judicial review" for precisely the reasons stated in *Heckler* v. *Chaney*, 470 U.S. at 821:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. *Id.* at 831-32.[33]

There are finally, additional reasons not to permit third-party tax challenegs to the tax status of a church. Recognizing the First Amendment rights at stake, Congress has imposed strict limits on church tax inquiries and examinations. 26 U.S.C. § 7611.[34] An inquiry may

---

[32] Cf. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-77 (1979); *Bingler* v. *Johnson*, 394 U.S. 741, 748-51 (1969).

[33] *Heckler* v. *Chaney* did not involve constitutional standing, but the reviewability of an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 701. Nevertheless, the Court's view of the appropriate role of the federal courts in reviewing agency enforcement decisions is fully applicable to the separation-of-powers/standing analysis required by *Allen*.

[34] See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1101-1114 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 1445, 1789-1802.

be begun only if "an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing)" that the church may not be exempt or is engaged in an unrelated trade or business. 26 U.S.C. § 7611(a)(2). The church must be given advance notice of the inquiry and an opportunity to meet with the Secretary before any examination of church records. 26 U.S.C. § 7611(a)(3). Church records may be examined "only . . . to the extent necessary to determine" any tax liability. 26 U.S.C. § 7611(b)(1).[35] Church tax inquiries and examinations must be completed as a general rule within two years. 26 U.S.C. § 7611(c). And no revocation of a church's tax exempt status may occur unless the regional counsel approves the revocation in writing and determines in writing that there has been substantial compliance with the requirements of section 7611.

Notwithstanding this elaborate statutory framework for the conduct of church tax inquiries and examinations, the plaintiffs would have a single district court judge launch a broad investigation into the tax-exempt status of some 30,000 Catholic Church entities throughout the United States. The court would presumably examine why the IRS has not taken enforcement action and whether, despite the IRS's judgment not to take action, those Catholic Church entities should lose their tax exemptions because some of them are alleged by private parties, "upon information and belief," to have crossed the line separating permissible from impermissible political activity.

Quite apart from the burden such a task would impose on the courts and the IRS, the nature of the task is such that it should not be undertaken at the behest of

[35] This provision would appear to impose stricter limits upon the examination of church records than the Federal Rules of Civil Procedure would impose upon these plaintiffs if this case were allowed to proceed.

these plaintiffs. Monitoring the IRS's performance in implementing and enforcing section 501(c)(3) of the tax Code "is appropriate for the Congress acting through its committees . . . ; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful action." *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). In this case, the plaintiffs point to no injury that is sufficient to warrant the extraordinary judicial undertaking that they seek. They are, therefore, without standing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
KEVIN T. BAINE *
RICHARD S. HOFFMAN
KEVIN J. HASSON
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

MARK E. CHOPKO
General Counsel
PHILLIP H. HARRIS
Solicitor
United States Catholic Conference
1312 Mass. Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

Counsel for Petitioners

Of Counsel:
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

* Counsel of Record

January 28, 1988